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SUPREME COURT, U.S.

No. 98-648

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

DONALD P. O'CONNELL, MARGARET KOSTOPULOS, AND DAWN CATUARA,

Petitioners,

v.

ANNMARIE MILAZZO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

STATEMENT OF THE CASE 1
Factual Background 1
ARGUMENT 3
I. The Petition Is Premature 3
II. The Seventh Circuit Is Not In Conflict With The Holdings Of The Other Circuits On The Issue Of The Standard For Duties Inherent In A Position 4
III. The Seventh Circuit Correctly Did Not Accord Defendants Qualified Immunity Where The Facts Upon Which Such Immunity Would Have To Be Based Are Contested 5
CONCLUSION 5

Table of Authorities

	Page
CASES	
Americanos v. Carter, 74 F.3d 138 (7th Cir. 1996)	5
Branti v. Finkle, 445 U.S. 507 (1980)	5
Heck v. City of Freeport, 985 F.2d 305, 309 (7th Cir. 1993)	5
Kline v. Hughes, 131 F.3d 708, 710 (7th Cir. 1997)	5
COURT RULES	
Fed. R. Civ. Pro. 56(f)	1, 4

Statement Of The Case

Factual Background

The chronology of this case begins with the filing of plaintiff's complaint. Defendants' initial pleading was a motion to dismiss, which was denied as to the political termination claim. Defendants filed an interlocutory appeal, in which the judgment of the district court was affirmed. Upon remand to the district court, defendants immediately filed a motion for summary judgement. In response to plaintiff's Fed. R. Civ. Pro. 56(f) motion, the district court judge allowed limited discovery on the issue of the nature of plaintiff's position, and then ordered briefing of the motion. The district court granted defendants' motion, and plaintiff appealed. The court of appeals reversed the district court, leading to defendants' petition to this court.

Plaintiff Annmarie Milazzo was hired by the Office of the Chief Judge of the Circuit Court of Cook County, Illinois in 1985, as secretary to the Executive Officer. Following a number of other promotions, in 1990 she was named Administrator of the Personnel Department, which department was later renamed the Human Resources Department. She remained in this position until her termination in mid-July 1995. Affidavit of Annmarie Milazzo paragraphs 2 & 3, attached to Plaintiff Rule 12N Statement, Rec. Doc. #61.

At least until the term of the present Administrator, Bruce Wisniewski, the function of the Human Resources Administrator for the Office of the Chief Judge of the Circuit Court of Cook County was to administer the activities of the Human Resources Department. Under plaintiff Milazzo, her predecessor, and her immediate successor, the primary functions of the department were handling the payroll for the Office of the Chief Judge, maintaining the personnel files of the employees of the Office of the Chief Judge, recording the personnel actions taken by the

supervisors of the various units of the Office of the Chief Judge, processing the hiring of new employees in the Office of the Chief Judge, and assisting in the preparation of budget documents for the Office of the Chief Judge. This budget role consisted of participating in the preparation of the forms and other documents that need to be completed to support the budget decisions made by the Chief Judge. The Human Resources Administrator did not meet with the Chief Judge to discuss policy issues, but received all direction from the Chief Judge's immediate subordinates. Plaintiff's Rule 12N Statement, paragraphs 22, 25, 26, & 27, Rec. Doc. #61.

Kerry Brown was plaintiff Milazzo's predecessor as Human Resources Administrator, when the department was named the Personnel Department. Plaintiff Milazzo was in the department for something under a year while Ms. Brown was Administrator. Based upon plaintiff Milazzo's observation, Ms. Brown administered the office in essentially the same manner as plaintiff did and had essentially the same authority as plaintiff had. Plaintiff's Rule 12N Statement, paragraph 27, Rec. Doc. #61.

Plaintiff's successor as Human Resources Administrator was Christina Hernandez, who occupied that position from September 5, 1995, until January 5, 1996. Catuara Interrogatory Answer #5, Exh.7, Rec. Doc. 61.

In her letter of resignation, Ms. Hernandez stated,

> Although I have enjoyed working with the Office of the Chief Judge, I would really like to operate in a wider management sphere, and since your Office is not willing to provide this opportunity, I feel that I should seek a position that allows greater freedom to make decisions and to function more independently.
>
> I leave the Human Resources Department with a better Recordkeeping, a better Skill Testing Program and a

Computer Program for categorizing, filing and responding to employment applications.

Plaintiff's Rule 12N Statement, paragraph 26, Rec. Doc. #61.

In January, 1996, Ms. Hernandez was succeeded as Human Resources Administrator by Bruce Wisniewski. Defendants' Rule 12M Statement paragraph 7, Rec. Doc. #53 & Plaintiff's Rule 12N Statement, paragraph 26, Rec. Doc. #61. Plaintiff's Complaint in this action had been filed on September 19, 1995. Three attorneys from the law firm of Jenner & Block filed their appearance as Special Assistant Attorneys General for the defendants on October 3, 1995. Rec. Doc. #6.

The district court found that the additional duties given to Mr. Wisniewski rendered the position subject to political firing. Those duties were interviewing and recommending employees to be hired, proposing new positions and reclassifying positions, and participating in disciplinary investigations. Brief of Appellant in court of appeals, pp. 13-14.

Plaintiff argued below, first, that even as the position of Human Resources Administrator was performed by Bruce Wisniewski, political affiliation was not an appropriate criteria. Br. of Appellant, pp. 20-24. Judge Cudahy stated in his concurring opinion below that "I believe. . . that there may be a genuine issue of fact as to whether political affiliation was an appropriate criterion for the position of Human Resources Administrator." Defendants' Petition, page 10a.

Plaintiff argued below, second, that plaintiff, her predecessor, and her successor had performed the Human Resources Administrator function in a ministerial fashion, and that defendants had added responsibilities to the position only after it was occupied by her successor's successor in order to defeat this suit. The Seventh Circuit ruled that if at trial plaintiff is able to prove that "political

affiliation is not a necessary requirement for the Human Resources Administrator or that defendants added responsibility to that position requiring Democratic affiliation only after this suit was filed, recovery would be warranted." Defendants' Petition, page 9a.

Argument

I. The Petition Is Premature

In this case only initial discovery has been conducted. Plaintiff will conduct additional discovery on the manner in which the incumbent Human Resources Administrator performs his duties, which was not explored by plaintiff during the limited Rule 56(f) discovery. Moreover, no discovery at all has been conducted on the issue of whether lack of political affiliation was a factor in plaintiff's termination. Consequently, even if this court were to find the issue presented by defendants to be of significance, the case has not yet been developed to the point where consideration by this court would be appropriate.

For example, defendants complain on pages 11 and 12 of their petition that plaintiff has provided no evidence of "manipulative motivation" to enhance the duties of the current Human Resources Administrator for purposes of defeating this litigation. But at this juncture the principal defendant, Chief Judge O'Connell, has not yet been deposed and no discovery has yet been conducted on his motives for doing anything. This illustrates the premature nature of defendants' petition.

II. The Seventh Circuit Is Not In Conflict With The Holdings Of The Other Circuits On The Issue Of The Standard For Duties Inherent In A Position

Defendants assert in their petition that the Seventh Circuit opinion conflicts with decisions of other circuits on the applicable

standard for defining the duties of a position, namely that it should be the policy making potential inherent in a position, not only the duties actually performed by an incumbent. A careful review of the Seventh Circuit opinions in this and other cases shows that the Seventh Circuit recognizes this standard and correctly applied it in this case.

The concept to which defendants refer has most commonly arisen in cases in which a terminated employee complains that he or she was only performing ministerial tasks, but the statute defining the duties of the position *at the time of termination* accorded the position broader authority than the plaintiff in the case was exercising. See, *Kline v. Hughes,* 131 F.3d 708, 710 (7th Cir. 1997); *Americanos v. Carter,* 74 F.3d 138, 141 (7th Cir. 1996); *Heck v. City of Freeport,* 985 F.2d 305, 309 (7th Cir. 1993). Defendants do not point the court to any case in which the plaintiff was performing ministerial functions, but the plaintiff's successor was given additional duties after suit was filed by that plaintiff.

The Seventh Circuit correctly applied the holdings of the earlier cases by recognizing that the inherent potential doctrine exists, but is inapplicable to the facts of this case. Moreover, as Judge Cudahy explicitly observes in his concurrence, there is a dispute of material fact as to whether or not the position even as performed by the incumbent Wisniewski (plaintiff's successor's successor) is a policy making position under *Branti v. Finkle*, 445 U.S. 507 (1980).

III. The Seventh Circuit Correctly Did Not Accord Defendants Qualified Immunity Where The Facts Upon Which Such Immunity Would Have To Be Based Are Contested

The Seventh Circuit explicitly rejected defendants qualified immunity claim in its first opinion in this case. There has been little change in the *uncontested* material facts applicable to the

qualified immunity claim. The Seventh Circuit concluded in its first opinion that the cases propounded by defendants on qualified immunity were "simply not analogous." Defendants' Petition, p. 31a. Defendants are urging the same cases on this court. The second Seventh Circuit opinion reflects the correct conclusion that there was no need to explicitly revisit the qualified immunity issue.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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